ROBERTS INTERNATIONAL AIRPORT, by and thru its General Manager, Petitioner, *v.* JOSEPH KAMARA, SR. and E. S. KOROMA, Circuit Court Judge, presiding by assignment over the People's Civil Law Court, Sixth Judicial Circuit, Montserrado County, and P. EDWARD NELSON, Sheriff for Montserrado County, Respondents.

APPEAL FROM THE RULING OF THE JUSTICE IN CHAMBERS DENYING THE ISSUANCE OF THE WRIT OF PROHIBITION

Heard: May 20 & 21st 1981. Decided: July 30. 1981.

1. In the absence of any evidence to refute the returns of the Sheriff, the presumption is that the precept was duly served.
2. If a defendant has failed to appear, plead or proceed to trial, or if the court orders a default for any other failure to proceed, the plaintiff may seek a default judgment against him.
3. Where a party moves the court and pleads to the merits of the case that party, by so doing, submits itself to the jurisdiction of the court, and is thereby barred from contesting the jurisdiction of the court at the appellate level.
4. Lack of personal jurisdiction is not a ground for a motion for relief from judgment. The proper remedy is writ of error.
5. Statutes regulate all procedures and provide remedies therefor; consequently, the mode prescribed by statute should be strictly adhered to in such cases and courts of justice should not ignore the statute and adopt a strange procedure not authorized by law merely to suit a particular situation.
6. Every defense, in law or fact, to a claim for relief in any pleading, shall be asserted in the respective pleading thereto, except that the defenses enumerated in section 11.2 may, at the option of the pleader, be made by motion. Where a pleader opts to file a motion, it must be filed at the time of filing an answer.
7. Where a court has jurisdiction, a wrong decision is not void, and therefore not subject to collateral attack. Similarly, writs such as prohibition, and *habeas corpus* may be available only where a court has acted without jurisdiction, and not on the ground that it acted erroneously.
8. A motion for relief from judgment does not put finality to a judgment or suspend its operation. Hence, an appeal announced from a ruling on a motion for relief from a judgment cannot serve as a *supersedeas* to the enforcement of the judgement.
9. The remedy available to an appellant upon the refusal of the trial judge to approve his bill of exceptions is mandamus.
10. Where a party claims that he was deprived of his day in court, the appropriate writ available to him is error. The issuance of the writ of error serves as *supersedeas* for the enforcement of the judgment complained of.

11. Among the duties required of the clerk of circuit court to perform is to take minutes of all trials of cases during the quarterly session and record all things ordered and done there.
12. The failure of the clerk of the circuit court to perform the ministerial duties connected with his office, whether through mistake or default, should not prejudice the party litigant. Where no duty exists, however, or where the negligence of the attorney or party intervenes, relief will be denied.

Co- respondent, Joseph Kamara, Sr., instituted an action of damages against R. S Junker, General Manager of the Roberts International Airport, for the death of his minor son. This action was subsequently withdrawn and another complaint filed stating the identical facts and circumstances, except that the defendant's name in the new action was the Roberts International Airport, by and thru it General Manager. When the writ of summons was served on the General Manager, he refused to accept it. No answer was filed, nor was there any formal appearance by defendant, now petitioner herein.

At trial, the clerk inadvertently called the case *Joseph Kamara Sr. v. R. S Junker, General Manager Roberts International Airport*, which is the case that was withdrawn. However, at the close of the trial, after the jury was charged, the verdict form that was given to the jury carried the caption of the 2nd case, *Joseph Kamara Sr. v. Roberts International Airport by and thru its General Manager,* action of damages. The jury returned a verdict awarding Co-respondent Kamara the sum of $50,000.00, and when a bill of costs was served on petitioner, he filed a motion for relief from judgment, which was rested, argued and denied. An appeal was prayed for, but it was denied, where-upon petitioner applied to the Chambers Justice for a writ of prohibition contending that it was not served with summons and therefore the court did not acquire personal jurisdiction over him and, that if it did, it exceeded its jurisdiction and proceeded by wrong rules.

The Justice in Chambers ordered the alternative writ issued and mandated the circuit judge to conduct an investigation to ascertain the truthfulness of the returns of the bailiff and the Sheriff. The investigation having revealed that the writ of summons was served on petitioner, the Justice in Chambers denied the application for prohibition, and quashed the alternative writ, from which ruling, petitioner appealed to the

Supreme Court.

The Supreme Court held that petitioner, having moved the court below and pleaded to the merits of the case, effectively submitted itself to the jurisdiction of the court and is barred from contesting the jurisdiction of the court at the appellate level. The Court also held that the lack of personal jurisdiction is not a ground for a motion for relief from judgment; the proper remedy is a writ of error; and that a motion for relief from judgment does not affect the finality of the judgment or suspend its operation. The Supreme Court also held that even though it was error for the court to have called the case that was already withdrawn and was no longer under the jurisdiction of the court, this error was connected with the ministerial duties of the office of the clerk, and that his neglect should not prejudice the rights of Co-respondent Kamara. Accordingly, the Supreme Court *affirmed* the ruling of the Chambers Justice, denied the petition, and quashed the alternative writ.

Julius Adighibe and *Nelson Broderick* appeared for petitioner and *S. Edward Carlor* appeared for appellee.

MR. JUSTICE YANGBE delivered the opinion of the Court.

The records certified by the clerk of the trial court and forwarded here in this case shows that initially Joseph Kamara Sr., filed an action of damages against R. S. Junker, General Manager of Roberts International Airport, Marshall Territory, Montserrado County, in the Civil Law Court, Sixth Judicial Circuit, Montserrado County, alleging in the complaint substantially (1) that on or before the 29th of May 1975, his minor child, Joseph Kamara Junior, was hit and killed instantly by an electric wire with high voltage owned by the petitioner in the area known as Vianini Yard within the vicinity of Unification Town, Marshall Territory, and (2) that although the petitioner company Manager had promised to compensate Co-respondent Kamara, now petitioner for the death of his minor child he had refused. Co-respondent Kamara prayed to recover therefor the sum of $50.000.00.

On the 8th of February 1978, the aforesaid action of damages

was withdrawn, and on the same date another action was filed by the same Co-respondent Kamara, stating the identical facts and circumstances, and naming the same amount of $50,000.00 as damages sustained and sought to be recovered. However, Co-respondent Kamara at this time named the Roberts International Airport, by and thru its General Manager, Marshall Territory, as defendant. A writ of summons was reportedly served on Petitioner Roberts International Airport, on the 9th of February 1978 by court's bailiff, George Sherman. But according to the bailiff, the Manager of petitioner company refused to accept the summons; neither did the company file an answer nor appear in court.

The records further reveal that on the 20th of November, 1980, on sheet twelve (12) of the minutes of the trial court, Thursday, the case, *Joseph Kamara Senior v. R. S. Junder, General Manager, Roberts International Airport, etc.* was called and the petitioner failed to appear either by counsel, in person or both, as a result, a plea of not liable was recorded in favour of the petitioner. Thereupon, a jury was constituted to hear evidence on the issue joined. After Co-respondent Kamara rested evidence, the jury was charged by court and it was handed a verdict form bearing the case, *Joseph Kamara Senior, etc. v. Roberts International Airport by and through its General Manager*, action of damages. After a due deliberation by the jury, it returned with an award of $50,000.00 for the Co-respondent Kamara. A bill of costs was served on petitioner for payment, and as a result, it filed a motion before the court of origin for relief from judgment. This motion was resisted by the respondent and denied by the court. An appeal was prayed for, but denied; whereupon petitioner filed a petition in the Chambers of Justice Mr. Roosevelt S. T. Bortue for a writ of prohibition. The alternative writ was served and returns thereto were filed. After due hearing, the Chambers Justice denied the petition and quashed the alternative writ, from which ruling petitioner has appealed to this Court for final adjudication.

The principle contentions in a proceeding of this nature, that we are to decide, are whether the court of origin had acquired personal jurisdiction, and if it did, whether the court exceeded its

jurisdiction and, having jurisdiction, whether it proceeded by wrong rules.

According to the records, on the 9th of February 1978, court's bailiff, George Sherman, and the sheriff for Montserrado County, made and filed the following returns duly endorsed on the back of the summons, to wit:

"On the 9th day of February A.D. 1978, court Bailiff George Sherman, reported that the within writ of summons was served on the within named defendant, the Roberts International Airport by and thru its General Manager, Marshall Territory, Liberia, but the said defendant deliberately refused to accept a copy of the writ of summons. I now make this as my official returns to the sheriff's office."

Dated this 9th day of February A. D. 1978.

Sgd: George Sherman
COURT BAILIFF

SHERIFF'S RETURNS

"I, the undersigned sheriff for Montserrado County do hereby certify that I do believe to be true and correct, (the above returns) and now submit to the office of the clerk of this honourable court, as my official returns."

Dated this 9th day of February A.D. 1978.

Sgd: Edward Nelson, II
SHERIFF, MO. CO., R. L.

Notwithstanding the returns quoted above, petitioner claimed that it was not served with summons; therefore, the Chambers Justice mandated the circuit judge to conduct an investigation so as to ascertain the truthfulness of the returns of the bailiff and the sheriff.

At the investigation, this is what the bailiff, George Sherman, said, *inter alia*:

"Your Honour in the year A.D. 1978 I was called upon by the sheriff to go to Roberts Field and serve a writ of summons. Mr. Joseph Kamara, the plaintiff and I arrived at Roberts Field and went to the manager's office and met the secretary and asked the secretary as to whether the manager was there and she said yes. She asked what happened. I told her that I had a writ of summons for the manager. She asked

that I produce same. I handed her the writ of Summons, she read same and took it into the manager. The manager thereafter came and stood at the door and required me to take the writ to the Ministry of Commerce to the Minister. I told him that it was not my job to carry the writ to the Minister of Commerce, but that he should receive same and take it to the Minister or any lawyer he wanted to retain to file an answer for him. Upon that he refused to accept his copy of the writ of summons. I referred same to the secretary that the manager has refused to accept his copy of the writ and that I was going to make my returns to the effect and she said go and do what you want to do. That is all."

After the testimony in chief of court's bailiff, quoted above, Joseph Kamara, the plaintiff in the court below, and now co-appellee, also deposed and rested. It is important to mention here that after rigid cross examination of the two witnesses conducted by counsel for petitioner during the investigation, two witnesses also testified for the petitioner, namely: Jackie Dennis and Doris E. Barbell, and both testified to the effect that they could not remember seeing court's Bailiff George Sherman, and Joseph Kamara, the plaintiff in the lower court, now co-appellee, at the office of the secretary to the general manager of the appellant company. They were asked to describe the secretary to the general manager and they did, whom they said was in the United States of America at that time of the hearing. But no mention was made by either one of them that they were at work on the 9th of February 1978, the date the summons was reportedly served on the general manager. It is important to also note that no effort was made to have the general manager appear and testify.

According to the testimony of the two witnesses named herein for petitioner, it is not clear whether they knew with certainty that the petitioner's manager was not served with the summons.

In the absence of any evidence to refute the returns of the sheriff, the presumption is that the precept was duly served. 42 AM JUR. 2d, §130, pp. 112; 62 AM. JUR. 2d., *Process,* § 164, pp.946-947; *idem,* §181, pp.960,

We are in full accord with the ruling of the Justice in

Chambers on this point of contention relative to the lack of service of precept on petitioner. Therefore, we quote his conclusion on this particular issue.

> "In the case at bar, not only was the writ of summons served on the defendant/company, petitioner herein, as indicated in the returns of the sheriff to the writ of summons, dated February 9, 1978, but also legal returns were made thereon by the sheriff. The burden of proof rests on the party who alleges a fact and the petitioner has not carried that burden to support its contention that the summons was never served. Civil Procedure Law, Rev. Code 1:25.5. The contention of the petitioner that process was not served on the defendant company is therefore not well taken and untenable, and same is hereby overruled."

It is clear from the records in this case that petitioner did not appear or file an answer, although petitioner was served with summons; and in that case the statute provides that:

> "If a defendant has failed to appear, plead, or proceed to trial or if the court orders a default for any other failure to proceed, the plaintiff may seek a default judgment against him." *Ibid.*,1:42.1.

Therefore, in our opinion, the trial judge did not proceed by wrong rules by rendering judgment by default against the petitioner.

In the motion filed for relief from judgment, petitioner raised certain legal and factual issues, pointing out alleged defects in the complaint and denying liability.

Counsel for respondents contended that petitioner having moved the court below and pleaded to the merits of the case, it thereby submitted itself to the jurisdiction of the court and is thereby barred from contesting the jurisdiction of the court at this appellate level. Counsel for respondents cited numerous opinions of this Court and we will mention few for the benefit of this opinion.

In *King v. Williams,* 2 LLR 523 (1925), this Court held that:

> "Where a party to a judicial proceeding admits by some act or conduct the jurisdiction of the court, he may not thereafter, simply because his interest has changed, deny the jurisdiction, especially where the assumption of a contrary

position would be to the prejudice of another party who has acquiesced in the position formally taken.

Counsel for appellees also cited the case *Gallina Blanca, S. A. v. Nestle Products Ltd.*, 25 LLR 116 (1976).

In the latter case, the defendant in the court below attacked the jurisdiction of the trial court in a motion to dismiss for lack of personal service of summons. The trial court denied the motion and, on appeal, this Court upheld the ruling of the lower court on the ground that appellant admitted the jurisdiction of the court below by moving the court for dismissal and pleading to the merits, thereby asking for relief from the court which appellant claimed had no personal jurisdiction.

The next point for our consideration relevant to prohibition is whether the trial court proceeded by wrong rules by denying the motion and by ordering the enforcement of the judgment.

Apart from what we have mentioned earlier in this opinion, in *Greaves v. C. F. Wilhelm Jantzen,* 24 LLR 420 (1975), this Court held that the lack of personal jurisdiction is not a ground for a motion for relief from judgment. The proper remedy for a person claiming that he has not had his day in court is a writ of error. This principle finds support in the Civil Procedure Law, Rev. Code 1:16.24(4); and in *Gbae et al. v. Geeby*, 14 LLR 147 (1960).

The Civil Procedure Law unequivocally provides that:

> "A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of the court to ascertain an independent action to relief a party from a judgment or to grant relief to a defendant under section 3.44."
>
> "Where a judgment is set aside, the court may award and enforce restitution in the manner and subject to the same conditions as where a judgment is reversed or modified on appeal." Civil Procedure Law, Rev. Code 1: 41.7(4)(5).

In our opinion, the statute regulates all procedures and provides remedies therefor; consequently, the mode prescribed by statute should be strictly adhered to in such cases made and provided, and courts of justice should not ignore the statute and adopt a strange procedure not authorized by law, merely to suit a particular situation.

In *Hill v. Tetteh,* 2 LLR 492 (1924), appellant contended that the motion of the appellee in the court below contained factual and legal issues which could have been raised in an answer. This Court, in deciding this point of contention, held that any demurrer or a plea a party may desire to raise in the case, should be pleaded in the answer and not in a motion. Also in the Civil Procedure Law, Rev. Code, 1: 9.8(1), it is stated that:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim or counterclaim, shall be asserted in the respective pleading thereto if one is required, except that the defenses enumerated in section 11.2 may at the option of the pleader be made by motion."

Section 11.2 referred to herein requires that the motion must be filed at the time of filing an answer or it must be raised in the answer.

In the instant case, petitioner, although served with summons, did not file an answer. The issue raised in the motion after final judgment, should have been tendered in an answer and not in the motion; the trial court therefore, did not err by denying the motion and ordering the judgment enforced.

Another contention of counsel for petitioner which he considered as an irregularity in the petition is that, the allegation stated in the complaint with respect to the cause of death of the child was not proven at the trial.

The authority on this contention is:

> "Lack of jurisdiction must be distinguished from an erroneous decision made by a court in exercising jurisdiction it possessed...."
>
> The distinction between lack of jurisdiction and any other error affecting a decision of a court is of practical importance, in that where a court has jurisdiction a wrong decision is not void, and therefore not subject to collateral attack. Similarly, writs such as prohibition and *habeas corpus*, may be available only where a court has acted without jurisdiction, and not on the ground that it acted erroneously."

Footnote eleven to this section is that:

> "A decision of a court having jurisdiction both of the subject matter and the parties, however irregular or

erroneous it may be, is binding until set aside."

Therefore, in our opinion, whether or not the court's decision is erroneous is not a jurisdictional issue; nor is it reviewable in a prohibition proceedings.

In count two of the returns, respondents raised a contention that the granting or denial of a motion, rests entirely within the sound judicial discretion of the court; and that the denial of the motion for relief from judgment does not put a finality to a judgment or suspend its operation. Therefore, he claimed that the appeal announced could not serve as a supersedeas; hence, the judge in the trial court did not proceed by wrong rule by denying the right of appeal.. Counsel for appellee also contended that the remedy provided by statute in case the motion is granted and judgment is reversed is restitution, and he cited the Civil Procedure Law, Rev. Code 1: 41.7; and *Ibid*:,1: 3.44.

Count two of the returns is well taken and cogent, therefore same is sustained as against counts 1,2,3,4,5,6,7, & 8 of the petition.

During the arguments before this Court *en banc*, in answer to a question, counsel for respondents said that no effort was made to perfect the appeal that was announced by petitioner, and counsel for petitioner in their closing argument did not deny it.

In keeping with the announcement of the appeal, petitioner should have prepared and tendered a bill of exceptions as the first jurisdictional step towards the perfection of the appeal, and if the trial judge had refused to approve the same, the remedy available to petitioner was mandamus. Civil Procedure Law, Rev. Code 1:16.21 (3). Prohibition should not be resorted to when adequate and ordinary remedies are available to the suitor, such as a writ of error and a writ of certiorari. 63 AM. JUR. 2d., *Prohibition,* § 8; 50 C.J.S, *Prohibition,* §§ 58, 61 and 62.

As we have mentioned *supra*, petitioner claimed that he was deprived of its day in court. Therefore, the appropriate writ available to petitioner was writ of error, and the effect of issuance of the writ of error serves as *supersedeas* for enforcement of the judgment complained against. Civil Procedure Law, Rev. Code 1: 6.24 (3).

On the 20th of November, 1980, the minutes of the trial court show:

"In Re: Joseph Kamara Senior of Unification Town, Marshall Territory, Montserrado County, Liberia, Plaintiff v. R. S. Junker, General Manager, Roberts International Airport, Marshall Territory, Liberia, Defendant, Action of Damages, is called."

On the same November 20, 1980, a verdict form with the title of the case, *Joseph Kamara Sr. of Unification Town, Marshall Territory, etc v. Roberts International Airport, by and through its General Manager, Marshall Territory, etc.*, action of damages, was handed to the empanelled jury who heard the evidence to render a verdict.

The records further reveal that on the 26th of November 1980, sheet 6, 4th day's chamber session of the trial court the case *Joseph Kamara Sr. etc. v. Roberts International Airport, etc.*, action of damages, was called and final judgment was rendered, confirming the verdict of the trial jury.

It is obvious that the first case, that is, *Joseph Kamara Sr. etc. v. R. S. Junker, General Manager, Roberts International Airport etc.*, action of damages, which had been withdrawn was no longer under the jurisdiction of the trial court. Therefore, it could not have been intended for trial. Yet, it appeared on the minutes of the trial court as being the case called on the 20th of November 1980 and no other minutes showing that the second case, *Joseph Kamara Sr. etc. v. Roberts International Airport,* was called for trial on that date.

It is crystal clear that there is an error, but the issue here is whose fault is it and what effect it has on the rights of the parties in this case?

According to statute, among the duties required of the clerk of circuit court to perform is:

"To take minutes of all the trials of cases held during the quarterly session and record all things ordered and done there." Judiciary Law, Rev. Code 17:3.13(e).

"It is the duty or function of a clerk of court to make and keep an accurate record of the proceedings in his court and of what the court orders and the judges decide. In the performance of these duties the clerk acts ministerially and under the exclusive jurisdiction and direction of the court, and has no power to pass on or contest the validity of any act

of the court which purports to have been done in the performance of its judicial function. Where required by statute, the clerk must make some record of the filing of the paper presented to him, keep a current general index of recorded instruments, and keep a trial or special proceeding docket."

Further:

" Those dealing with the clerk of the court concerning an action or matter then pending have a right to expect that he will perform the ministerial duties connected with his office, and his neglect or failure to do so should not prejudice their rights. This principle has been frequently applied in cases where a party seeks relief from judgment rendered against him by reason of some mistake or default of the clerk. Where no duty exists, however, or where the negligence of the attorney or suitor intervenes, relief will be denied them, even where they rely on promises or statements of the clerk, or where the clerk failed to answer letters of inquiry about the status of the case and judgment was rendered without their knowledge." 15 AM. JUR. 2d, *Certiorari,* §26, pp.529; and 23 AM JUR, 2d.,§26, pp.531-532.

The plaintiff in the lower court, now Co-respondent Kamara, had no part to perform in the recording of the minutes of the trial had in the court below, or the error that was committed by recording a case which had already been withdrawn instead of recording the second case that was pending. It is also vital to mention that according to our practice, it is the clerk of court who usually mimeographs the verdict form, fills in the name of the particular case on trial, and gives same to the jury during the trial of the case for the jury to fill in its findings, sign it, and return it to the court without the intervention of the parties or their attorneys. The instant case is no exception. It was the same clerk of court who filled in the verdict form in this case and gave it to the jury. It is therefore obvious that the recording of the withdrawn case in the minutes was the error of the clerk of court and the parties had no part to perform. Consequently, neither party should suffer thereby. *Jantzen v. Freeman,* 2 LLR 167 (1914).

Another point of argument which we feel deserves our comment, is the clerk of court's certificate attached to the brief of petitioner, dated March 23, 1981.

Counsel for respondents argued that the certificate of the clerk of court is dated subsequent to the ruling of the Chamber Justice, dated the 13th of February, A. D. 1981. Hence, the issues intended to be introduced by that certificate were never raised and decided by the Chambers Justice whose ruling is the subject of review in this case, therefore, we should not take cognizance of the instrument.

The appellate court should examine a case upon the records transmitted to it through channel only and shall hear no additional evidence. Civil Procedure Law, Rev. Code 1: 51.15 (2).

The certificate herein referred to is not part of the records forwarded to this Court from the court of origin or from the Chambers of His Honour Mr. Justice Bortue whose ruling we are reviewing *en banc.*

According to PRC Decree No. 3, dated April 24, 1980, section 102, the People's Supreme Tribunal inherits all the powers and functions of the former Supreme Court of Liberia, which was created according to Article 4 of the suspended Constitution of Liberia. Accordingly, we have original jurisdiction in all cases affecting Foreign Ambassadors or Public Officers and Consuls and those to which a Country or Territory shall be a party. In all other cases, the People's Supreme Tribunal shall have appellate jurisdiction, both as to law and facts.

In our opinion, it is obvious that to entertain the certificate of the clerk of court annexed to petitioner's brief which was issued subsequent to the date of the ruling of the Chambers Justice, we will undoubtedly be assuming original jurisdiction over the certificate in direct contravention to the provision of PRC Decree No. 3, referred to above; therefore, we will refrain from making further comment on the document.

Counsel for petitioner averred in count nine of the petition that Roberts International Airport is an agency of, and is owned by the Government of Liberia and, therefore, not subject to money judgment. In support of this allegation, petitioner proferted two sheets of paper known as management service contract, showing the dates of October 1, 1980 to September 30,

1984. There is no averment in the petition or any explanation during the argument of this case as to the whereabouts of the entire document and why petitioner elected to only profert a portion thereof. Petitioner should have proferted the entire document to enable the Court to inspect it as a whole and determine how it relates to the case in point. 71 C. J. S., *Pleading,* § 368, pp. 770 & 772; and Civil Procedure Law, Rev. Code 1: 9.3(4).

The alleged management services contract is also referred to in the motion for relief from judgment, which was filed in the trial court by petitioner. We have already mentioned our view on the ruling of the court below denying the motion; therefore, no further comment is necessary on it.

We would like to also mention here that the Republic of Liberia is not a party plaintiff or party defendant in the court below, or at this appellate level. Consequently, the writ of execution is directed only to the defendant, now petitioner, in this case; the Republic of Liberia not being a party, it is needless to mention that the judgment in this case does not affect her.

In view of the facts stated and the law cited above, we have no other choice but to confirm the ruling of the Chambers Justice. Therefore, the petition is denied, the alternative writ is quashed and the Clerk of this Court is instructed to send a mandate to the trial court ordering the judge presiding thereat to resume jurisdiction in the case and enforce the judgment, with costs against the appellant. And it is so ordered.

Ruling affirmed; prohibition denied.